

18. 1948

In the Privy Council.

No. 87 of 1946.

ON APPEAL

FROM THE SUPREME COURT OF GIBRALTAR  
SITTING AS A COURT OF FIRST INSTANCE.

IN THE MATTER of the Estate of ANGEL COSTA, deceased.

BETWEEN

PETER COSQUIERI - - - - - *Appellant.*

AND

MAGDALENA FORMENTO (Spinster), MAGDALENA  
SCULLARD (Married Woman), ANGEL FORMENTO,  
VICTORIA FORMENTO (Spinster), VIRGINIA  
LATIN (Spinster), EDUARDO LABRADOR, JUAN  
DANINO, LOURDES RUIZ (Married Woman) and  
JOSEPH FERNANDEZ - - - - - *Respondents.*

CASE FOR THE RESPONDENTS

(Other than the above-named JOSEPH FERNANDEZ.)

UNIVERSITY OF LONDON  
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12 NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

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CASE FOR THE RESPONDENTS  
(other than the above-named  
JOSEPH FERNANDEZ)

WILLIAM A. CRUMP & SON,

10-11, Lime Street, London, E.C.3.

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AND

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SCULLARD (Married Woman), ANGEL FORMENTO,  
VICTORIA FORMENTO (Spinster), VIRGINIA  
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DANINO, LOURDES RUIZ (Married Woman) and  
JOSEPH FERNANDEZ - - - - - *Respondents.*

CASE FOR THE RESPONDENTS

(Other than the above-named JOSEPH FERNANDEZ.)

1. This is an appeal by the above-named Peter Cosquiere, one of the original Defendants, from an Order and Declaration of the Supreme Court of Gibraltar, sitting as a Court of First Instance, dated the 1st day of August, 1946. Record. No. 12 p. 28.

2. The matter for determination in the appeal is the true construction of the Will of the above-named Angel Costa, deceased, in so far as it concerns 127, Main Street, Gibraltar, the house and shop referred to in the said Will, such premises being R. No. 574 in the General Plan of the Garrison of Gibraltar.

3. The said Angel Costa, deceased, made his Will in the Spanish language on the 21st day of August, 1944, and died on the 29th day of August, 1945, at Gibraltar, without having revoked or altered such Will, which on the 23rd day of October, 1945, was duly proved by the executors therein named in the Supreme Court of Gibraltar. No. 9. (Separate document) No. 10. p. 20.

4. By an Order of the Supreme Court of Gibraltar made in an action marked 1945, C, No. 26, it was *inter alia* declared that the said Angel Costa died intestate as to his residuary estate, the aforesaid premises forming part of such residuary estate. These Respondents being the next of kin of the said deceased testator, are the persons entitled to the freehold interest in the said premises by virtue of such declaration. p. 2, l. 40.

p. 20, l. 39. 5. The said Will contains a direction (which is in particular the subject matter of this Appeal) a true translation of which direction is in the words following: "I direct that the rent of the house which Mr. Peter Cosquieri occupies be not increased nor his rent be increased in any manner nor notice to quit be given to him so long as he shall pay punctually the rents stipulated in the contract. When rents revert to normal this will be as stipulated £30 per month and payment by him of the Rates and Water according to the contract, with option to its renewal if he so desires on equal circumstances and the house shall not be ceded to anyone and let he and his sons have the right to occupy the house and shop." 10

No. 7.  
p. 6. 6. By a Deed of Partnership dated the 11th day of June, 1927, the above-named Respondent Joseph Fernandez and the above-named Appellant Peter Cosquieri became partners under the firm name of "Cosquieri & Co." in the business of ironmongers and general merchants.

p. 19, l. 10. 7. On the 27th day of December, 1945, the said Peter Cosquieri gave notice in writing to the said Joseph Fernandez of the determination on the 30th day of June, 1946, of the said partnership.

No. 8.  
p. 10. 8. By an Indenture of Lease dated the 18th day of June, 1927, and made between the said Angel Costa of the one part and the said Joseph Fernandez and the said Peter Cosquieri, trading under the said firm name of "Cosquieri & Co." of the other part, the afore-mentioned premises were demised by the said Angel Costa to the said Cosquieri & Co. from the 1st day of June, 1927, for the term of fourteen years at the monthly rental of thirty pounds sterling. Such lease contained no proviso for renewal, and there has been no extension of such lease which expired in the year 1941. The said premises consist of a ground floor occupied by the said Cosquieri & Co. for business purposes and a first floor occupied as dwellings by the said Peter Cosquieri and his family. 20

p. 29, l. 12. 9. On the 1st day of October, 1940, an Ordinance to give relief in respect of rent, rates and mortgage payments, the short title of which is "The Defence (Emergency Relief) Ordinance, 1941" came into operation. On the 1st day of August, 1946, when giving his order with reasons in this matter, the learned Chief Justice observed that the rent of the said premises reverted to normal on the 1st day of October, 1945. 30

No. 1.  
p. 1. 10. The present proceedings were commenced in the Supreme Court of Gibraltar by Originating Summons issued upon the application of George Michael Gonzalez, Trader, and Ernest Joseph Guetta, Insurance Agent, executors and trustees with the said Peter Cosquieri of the said Will. Such Originating Summons (re-issued on Amendment) was dated the 26th day of June, 1946, and was filed on the 18th day of June, 1946, for the determination of the following questions and matters:— 40

- (1) Whether according to the true construction of the said Will the Plaintiffs have power and ought to grant a lease to the Defendant Peter Cosquieri and his sons of the house occupied by him mentioned in the said Will.

(2) If the Court shall be of opinion that the Plaintiffs have such power what are the conditions under which such lease should be granted and for what term.

(3) That the costs of this application may be provided for.

(4) That such order or direction may be made as the circumstances of the case may require.

11. This matter came on for hearing on the 15th, the 29th and the 31st day of July, and the 1st day of August, 1946, before His Honour Roger Bacon, Chief Justice of Gibraltar. At such hearing it was contended on behalf of these Respondents that the passage in the said Will set forth in paragraph 5 hereof was void for uncertainty and that no effect could be given to it consistently with the rules of law. No. 11. p. 23, *ex seq*

12. The Learned Chief Justice delivered a judgment with reasons on the 1st day of August, 1946, whereby he held that the effect of the said passage was to devise a conditional gift in favour of Cosquiere & Co., namely an option for a lease of the premises in question. Upon the principles and for the reasons stated in his said judgment and by way of implementing his decision the learned Chief Justice made the Order and Declaration referred to in paragraph 1 hereof. No. 13. p. 29.

13. An Order giving the said Peter Cosquiere conditional leave to appeal was made upon motion on the 26th day of August, 1946, and a further Order giving final leave to appeal was made on the 18th day of September, 1946. No. 12. p. 28. No. 16. p. 35. No. 18. p. 37.

14. These Respondents now humbly submit that this appeal should be dismissed for the following (among other)

#### REASONS.

(1) Because on the true construction of the Will the direction referred to in paragraph 5 hereof is void for uncertainty.

(2) Because it is not possible to give effect to the expressed intention of the testator consistently with the rules of law.

30 (3) Because if the said direction creates or purports to create a trust, the expression and the intended operation of such trust are not clear.

(4) Because the said direction is merely the expression of a hope, recommendation, confidence or request, as is especially manifest from the final words of such direction, ". . . and let he and his sons have the right to occupy the house and shop."

(5) Because if the said direction constitutes a conditional gift there is no particularity of expression as to the subject or object of such conditional gift.

(6) Because if the said direction constitutes a conditional gift such direction contains alternative meanings and there is insufficient in the context of such direction or in the evidence to resolve the ambiguity.

(7) Because the Testator knew or ought to have known :—

- (a) that the lease, referred to in paragraph 8 hereof, was granted to the said Joseph Fernandez and the said Peter Cosquieri trading under the firm name of “ Cosquieri & Co.” ;
- (b) that the said lease contained no proviso for renewal ;
- (c) that the said lease had expired at the date of the said Will ;
- (d) that there had been no extension of the said lease ; and 10
- (e) that at the date of the said Will the said firm were in occupation of the said premises as tenants holding over ;

and notwithstanding such knowledge he did not make it sufficiently or at all clear in the said direction whether he intended to devise a conditional gift in favour of the said Peter Cosquieri or in favour of the said firm or in favour of the said Peter Cosquieri and his sons.

(8) Because if the said direction constitutes a conditional gift it is not possible to say with reasonable certainty in what event forfeiture of the estate comprising such conditional gift will occur.

(9) Because in Gibraltar the Spanish word *Casa* which is used in 20 the original Will is capable of meaning the “ whole house ” or the “ upper storey ” and the testator has not made it sufficiently or at all clear which of such meanings is intended, thus creating a latent ambiguity in the said direction which has not been solved by any or any sufficient evidence of previous intention.

(10) Because the words in the said direction, namely, “ . . . . on equal circumstances ” are not capable of bearing any meaning.

(11) Because the words in the said direction, namely, “ . . . . and the house shall not be ceded to anyone . . . . ” are repugnant to the law as being a restraint on alienation. 30

(12) Because the final words in the said direction, namely, “ . . . . and let he and his sons have the right to occupy the house and shop ” are inconsistent with the remainder of the said direction.

(13) Because it is not possible to ascertain the intention which the said direction either expressly or by implication declares.

(14) Because it is not possible to give a clear and definite meaning to the said direction which is garbled, inconsistent, ambiguous and obscure.

(Sgd.) ROLAND ADAMS.

